In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 35

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TEXTILE WORKERS UNION OF AMERICA, CIO, AND ITS AGENTS EARL MCGREW AND FRANK R. METZGER, AND LOCAL 1172, TEXTILE WORKERS OF AMERICA, CIO, AND ITS AGENTS FRANK R. METZGER, ANTON DVORSCAK, AND FRANK TURK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD RESPECTING MOOTNESS

The Solicitor General, on behalf of the National Labor Relations Board, respectfully calls to the Court's attention certain new facts which raise a possible question of mootness in this case, now awaiting argument on the merits. Although, in our judgment, these new facts do not render the case moot, we think it appropriate to inform the Court of these developments and of our views as to their effect, if any, on the status of the case.

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The history of the case is as follows: On May 5, 1954 ~~1944~~, the Board found, in relevant part, that the respondent Unions (and the named agents) who were then the bargaining representative of the employees of Personal Products Corporation [1] had violated Section 8 (b) (3) of the Act (R. 80–91), by engaging in slowdowns, intermittent stoppages and other disruptive conduct during the course of collective bargaining negotiations with the Company. It ordered (R. 90) the respondents, Textile Workers Union of America, and Local 1172, Textile Workers of America, CIO, their successors, assigns, officers, and representatives, and agents, including four named individuals, to cease and desist from

> Refusing to bargain collectively in good faith with the Company, by engaging in slowdowns and unauthorized extensions of rest periods; by [other specified conduct] or by engaging in any similar or related conduct in derogation of the statutory duty to bargain, in this order [sic] being conditioned upon Respondents remaining the representative of the employees in the unit herein found to be appropriate, subject to the provisions of Section 9 (a) and (c) of the Act.

Affirmatively, respondents were required upon request to

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[1] Respondent Textile Workers Union of America, CIO, was certified by the Board as the bargaining representative of these employees on February 12, 1951. Respondent Local 1172 was chartered by the Textile Workers on February 28, 1951; it admits to membership only employees of the Company and, jointly with respondent Textile Workers, acted as the bargaining representative of the employees during the events which give rise to this case (R. 20, 21, 22–27).

> bargain collectively with Personal Products Corporation so long as respondents remain the ~~the~~ representative of the employees in the unit found above to be appropriate, subject to the provisions of 9 (a) and (c) of the Act.

The court below, holding that respondents had not refused to bargain in violation of Section 8 (b) (3), as found by the Board, denied enforcement of those portions of the Board's order quoted above (R. 105–113). The Board's petition for certiorari was granted on April 2, 1956 (R. 116). 350 U. S. 1004.

On July 31, 1956, the Board, at the conclusion of representation proceedings, certified another union, United Textile Workers of America (AFL-CIO), as the representative of the employees of the Company. *Personal Products Corp.*, 116 N. L. R. B. No. 47. The latter union is not a successor nor is it associated with respondent unions, apart from their common affiliation with the AFL-CIO. This certification followed a closely contested election in which, after counting some challenged ballots, respondent Textile Workers Union of America, CIO received 58 votes and the certified union received 61 votes. Subsequently, respondent Textile Workers Union of America, CIO filed a motion requesting the Board to reconsider and withdraw the certification pending the disposition by the General Counsel of the union's appeal from the regional director's refusal to issue a complaint on charges that several employees whose votes were challenged in the representation proceedings were discriminatorily denied employment by the Company prior to the election, in which case their

votes should be counted. The Board denied this motion on September 14, 1956.

In view of the foregoing, the question may arise whether respondent unions' present lack of representative status renders moot the bargaining order which is the subject matter of litigation in the instant case. The general rule is that the Board is entitled to a decree of enforcement, even where the respondent has ceased violating the Board's order, as an assurance against recurrence of violations. "A Board order imposes a continuing obligation; and the Board is entitled to have the resumption of the unfair practice barred by an enforcement decree. * * * The Act does not require the Board to play hide-and-seek with those guilty of unfair labor practices." *National Labor Relations Board* v. *Mexia Textile Mills*, 339 U. S. 563, 567–568.[2] If, however, because of supervening facts, recurrence becomes an impossibility or an extremely remote contingency, the case may be deemed moot.[3]

In this case a possibility, by no means remote, exists that respondent Union may resume the status of bargaining representative in this plant. It is still actively functioning as a labor organization. Its loss of rep-

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[2] *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *National Labor Relations Board* v. *Crompton-Highland Mills, Inc.*, 337 U. S. 217; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 307–312; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257, 260.

[3] See, for example, *National Labor Relations Board* v. *Hollywood-Maxwell Co.*, 126 F. 2d 815, 823 (C. A. 9).

resentative status in this plant was by a two-vote margin in a vigorously contested election. We are informed that the Union is still actively interested in representing these employees whom it has represented for many years in the past. In these circumstances, it may reasonably be anticipated that the Union will once again make a bid for certification as bargaining representative when a year has elapsed.[4] A further contingency, admittedly speculative at the present time, is that the Union and the United Textile Workers, which are both affiliated with the AFL-CIO, may merge. If that should occur, it could provide a basis for making the order effective against the successor union. *National Carbon Co.*, 116 N. L. R. B., No. 68, 38 L. R. R. M. 1284.

Thus, it cannot be said here that recurrence of the acts barred by the Board's order is remote and unlikely, and that a decree of enforcement would serve no useful purpose. An injunction would insure against a repetition of violations in the event respondents resume the status of bargaining representative. The obvious fact that the immediate need for the injunction "may be less than when made" does not render the order moot. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. at 271.[5]

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[4] Under the Act, Section 9 (c) (3), elections may not be held more often than once a year.

[5] In the *Pennsylvania Greyhound* case, the Court rejected the contention that a Board order requiring the employer to disestablish a company-supported union was moot because of an intervening certification of another union.

The instant case appears to be no different, essentially, from the many cases which hold that the disappearance or abandonment of a company dominated or supported union does not moot an order requiring the employer to disestablish the organization and withdraw recognition from it. *National Labor Relations Board* v. *Saxe-Glassman Shoe Corporation*, 201 F. 2d 238, 244 (C. A. 1); *Harrison Sheet Steel Company* v. *National Labor Relations Board*, 194 F. 2d 407 (C. A. 7), enforcing 94 N. L. R. B. 81, 85; *National Labor Relations Board* v. *Lund*, 103 F. 2d 815, 821 (C. A. 8); *A. E. Staley Mfg. Co.* v. *National Labor Relations Board*, 117 F. 2d 868, 879 (C. A. 7). The suggestion of mootness in the cited cases has been rejected on the ground that the banned organization may reappear in the future.

Also relevant are the numerous cases where the courts have entered decrees enforcing Board orders, including affirmative and negative provisions, notwithstanding that the respondent employer has gone out of business. *National Labor Relations Board* v. *National Garment Company*, 166 F. 2d 233, 238–239 (C. A. 8); *National Labor Relations Board* v. *Acme Mattress Co.*, 192 F. 2d 524, 528 (C. A. 7); *National Labor Relations Board* v. *Somerset Classics*, 193 F. 2d 613, 615–616 (C. A. 2). The rationale of these decisions is that there should be some assurance against a repetition of the infractions in the event the defunct business is revived or reemerges in another form. "And these principles may be applied in fuller measure in furtherance of the public

interest, which here the [Board] represents, than if only private interests were involved" *Walling* v. *Reuter Co.*, 321 U. S. 671–675. The same general considerations apply here.

It may be suggested, however, that the Board's order by its express terms is operative only "so long as respondents remain the representatives," and hence the order by its own terms expired with respondents' loss of representative status. The Board's use of the word "remain" was not intended, however, to give the order such a limited scope. As noted above, Board orders normally impose a continuing obligation. The Board does not construe the order here as limited to the duration of the current certificate. In other cases involving union refusals to bargain the Board has normally required the union to cease and desist from refusing to bargain "so long as they are [or 'it is'] the representative."[6] No departure from this general practice was implied by use of the word "remain" in the order in this particular case.

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[6] *Chicago Typographical Union, No. 16*, 86 N. L. R. B. 1041, 1048; *International Typographical Union*, 87 N. L. R. B. 1418, 1426; *Local 1664, ILA*, 103 N. L. R. B. 1217, 1221. See also, *Harrison Sheet Steel Co.*, 94 N. L. R. B. 81, 84 (order requiring the employer to disestablish "the Employee Representative Plan in the event that it return to active existence"). *Local 688, Teamsters' Union*, 116 N. L. R. B. No. 115, 38 L. R. R. M. 1345 (order enjoining union from engaging in unlawful strike for recognition, notwithstanding employer's recognition of the union).

Accordingly, in our view the instant case has not become moot.

Respectfully submitted.

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM FOR TEXTILE WORKERS UNION OF AMERICA RESPECTING THE QUESTION OF MOOTNESS

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MEMORANDUM FOR THE RESPONDENTS WITH RESPECT TO THE QUESTION OF MOOTNESS

The respondents submit this Memorandum in response to the "Memorandum for the National Labor Relations Board Respecting Mootness."

Respondents are not anxious to continue a meaningless litigation and we would, of course, suggest a dismissal of this proceeding on the ground of mootness if this were required or even consistent with the proper judicial treatment of Board orders.

We are aware, of course, of the certification by the Board of the United Textile Workers of America (herein called the UTW) as the representative of the employees of the Company in the particular plant here involved. But we have not made a suggestion of mootness to the Court. The reason

is not that we necessarily concur in the speculations contained in the Board's memorandum as to the probable developments with respect to the representation of the employees of the Company. The reason is that we believe, wholly irrespective of the considerations mentioned in the Board's memorandum, that such a suggestion would be inconsistent with the proper judicial treatment of Board orders.

A Board unfair labor practice proceeding is essentially a proceeding to determine if the charged party has in fact committed a past violation of the Act. Unlike some other administrative proceedings in which an administrative regulation is promulgated in the proceeding, the Board in unfair labor practice cases concerns itself only with whether the respondent has violated the law as it stands on the books. Indeed, the function of issuing complaints by the General Counsel was analogized by one of the authors of the Taft-Hartley Act to the prosecutor's function in criminal proceedings. See Senator Taft's analysis, 93 Cong. Rec. 6858, 80th Cong., 1st Sess. (1947).

If the Board finds a past violation, then the question of remedy occurs. In certain cases the Board issues remedial orders to correct the infraction of rights which has occurred in the past—as in the case of orders for back pay. In other cases, the Board issues only a cease and desist order or a direction which consists essentially only of an injunction to comply with the Act in the future in the respect in which it has been found that it has not been complied with in the past. Usually, as in this case (R. 91, 78), such orders are accompanied by a direction to post notices.

In many cases it is true that if the courts affirm the adjudication of past violations the order directing future compliance with the Act which results will have little or no practical utility. The essential and important part of the judicial process in such cases is the affirmance or reversal of the adjudication of past violation. This affirmance or reversal

does not constitute an advisory or speculative process—the question is whether, in the particular case and on the particular facts presented, there has or has not been a violation of the Act.

Except in the limited number of cases in which such affirmative action as reinstatement and back pay orders is involved, the primary and significant result of the Board's order is the adjudication of past violation. The Board's order as to future conduct makes no substantive difference whatsoever in the rights of the parties. The respondent who is ordered to cease and desist from certain conduct was, presumably, under a substantive duty to cease and desist from from such conduct in the first place. *N.L.R.B.* v. *General Motors Corp.*, 179 F. 2d 221, 222 (C.A. 2, 1950).

There is, of course, a difference. That difference is that, after an order has been entered and judicially confirmed, this duty can be enforced by a contempt proceeding in the Court of Appeals.

The question of likelihood of recurrence, which is the question to which the Board essentially addresses itself to, is therefore essentially a question as to whether or not there is likely to be such a sequence of events that a contempt proceeding will be invoked. This is a question relating to the propriety of the remedy requested from the courts, or as the Board says, as to whether a decree would serve a "useful purpose," not a question of mootness. And the courts have almost uniformly so treated it in every case in which there has been a change in circumstances between the time of the Board's order and the date of judicial review.

The most familiar examples are those in which the Board's order has already been complied with at the time enforcement is sought. "We think it plain from the cases that the employer's compliance with an order of the Board does not render the cause moot . . .", *N.L.R.B.* v. *Mexia Textile Mills*, 339 U.S. 563, 567, and cases there cited.

Other examples are the cases, cited by the Board, in which orders directing an employer to disestablish or withdraw recognition from a company union which has already ceased to exist have been enforced.

Perhaps most significant are the cases in which Board orders have been enforced against an employer despite the fact that he has since gone out of business. The Board in its memorandum asserts that these cases all rest on the likelihood of repetition of the past violations and assumes that if it is shown that the probability of such recurrence is remote the cases would be moot. This seems to us plainly wrong. So long as the party to whom the Board's order is directed is still in existence and recurrence is not demonstrably impossible, it seems to us that the Board's adjudication of past violation cannot be moot.

This certainly is the approach illustrated in two cases not cited by the Board. In *N.L.R.B.* v. *Caroline Mills, Inc.* 167 F. 2d 212, 214, (C.A. 5) a Board order to post notices and to reinstate an employee was enforced notwithstanding the employer's allegations that it had gone out of business, that its plant was being dismantled and that its employees had all been dismissed. Of course, said the Fifth Circuit, in a decision not otherwise sympathetic to the Board, if these allegations were true the Court would not hold the employer in contempt for failing to reinstate the employee. But the order, based on the past violations, should, nevertheless, issue. See also *N.L.R.B.* v. *Haspel,* 228 F. 2d 155 (C.A. 2) in which the court similarly disregarded objections to the granting of an enforcement order in these words:

> "There is no merit to respondent's contention that, since the question has been rendered 'academic' by reason of his going out of business, we ought not to grant enforcement of the Board's order . . . The present status of the business is material only on the matter of compliance with our decree, and the Board will nat-

urally not require action now impossible for respondent to perform." 228 F. 2d at 156.

Neither the Board nor a court of appeals (and certainly not this Court) is in a position to assay the probability of future recurrence in each case which comes before it. And certainly no such uncertain prophecy should constitute the basis for a determination as to whether a case is moot.[1]

In this case, for example, we frankly do not know what the likelihood is that the Textile Workers Union of America will again engage in slowdowns and similar concerted activity short of a strike in support of its collective bargaining position with the Personal Products Co. The likelihood of such an occurrence depends not only on our being again the collective bargaining representative of the employees—which can occur as a result of another election, disaffiliation of the local unit of the UTW and affiliation with TWUA, merger of the two international unions, agreement between the two unions short of merger, or in other ways. It depends also on a repetition of the circumstance that the existing collective agreement forbidding such activity has expired, that no agreement can be reached on a new contract, and that the economic situation is such that a slowdown rather than a full strike is deemed the most feasible method of supporting with economic force the union's good-faith bargaining position.

Certainly it is not impossible that such a combination of circumstances should recur. But the probability that it will recur seems to us impossible to estimate. It involves not only speculation based on the closeness of the last vote at this unit, and the progress of merger negotiations be-

[1] For this reason we think the use of mootness language in *N.L.R.B.* v. *Hollywood Maxwell Co.*, 126 F. 2d 815, 823 (C.A. 9, 1942), cited by the Board, as well as in *N.L.R.B.* v. *Reynolds Corp.*, 168 F. 2d 877 (C. A. 5, 1948), not cited by the Board, is erroneous. It is clearly inconsistent with the overwhelming weight of authority.

tween TWUA and UTW—which the Board mentions—but also speculation as to the duration of any contract between UTW and the Company, the impact of the AFL-CIO No-Raiding Agreement, the possibility of an arrangement between UTW and TWUA pursuant to which each of the Unions withdraws its representation claims in favor of the other at certain of the company's plants, the economic prospects in the industry and the area, the potential strength of the union in any future disagreement, and a host of other factors.

We think it is improper to ask this Court to indulge in such speculation. We do not think, in short, that the likelihood of recurrence is the test for mootness. We think that the elements which we have mentioned are relevant, if at all, only to a determination as to whether it is appropriate to issue a cease and desist order if it should be decided that there has been a past violation of the Act. If this Court should find, after argument on the merits, that there has been such a violation—and that is the only question presented to it by the petition for certiorari—then it might be appropriate to remand the case to the Court of Appeals to consider the appropriateness, in the light of the subsequently occurring facts raised in the Board's memorandum, of a cease and desist order, although the cases seem to indicate to the contrary.

But whatever the disposition of that question, it seems to us this case is not moot. The issue of whether or not TWUA violated the Act by engaging in the course of conduct which it did in 1953 is clearly not moot. There is a possibility, whether large or small we cannot say, that the same combination of circumstances which lead TWUA to engage in that course of conduct will recur. If it does, and if the membership so agrees, TWUA may again urge the employees to engage in a similar course of action in

support of the Union's bargaining position. Certainly, we believe, contrary to the Board, that the Union would not violate its duty to bargain if it should do so.

Respectfully submitted,

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